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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 237.

LUTHER WEEDIN, Comissioner of Immigration at the Port of Seattle, Washington,

Petitioner,

against

CHIN BOW,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENT.

Statement of Facts.

The Government seeks to exclude from admission to the United States as an "alien ineligible to citizenship" under section 13 subd. (c) of the Immigration Act of 1924 (43 Stat. 161) the nine year old son of an American citizen by birth.

It is admitted that the father was born an American citizen, that he has never lost his American citizenship, that he had for some years been a resident of this country

when the Immigration Act of 1924 was passed, and that the respondent is the legitimate son of his American father.

The respondent contends that the minor son born to an American citizen by birth who is a permanent resident of the United States and was such at the time the Act was passed, is not and cannot in law be regarded as "an alien ineligible to citizenship"; that, on the contrary, said minor son, although born prior to the time when his father came to his native country to reside, was born, and is an American citizen, and that the Immigration Act has no application to him whatsoever.

The respondent is a twelve-year-old boy, the son of one Chin Dun, an American citizen by birth, but of Chinese descent. Chin Dun was the son of a native-born American, Chin Tong. On June 18, 1922, the respondent's father came to the United States for the first time and was duly admitted as an American citizen by birth. Two years after his arrival here, he sent for the respondent to join him, and the latter, on July 9, 1924, when a child of ten, sought admission at Seattle, Washington, as the son of an American citizen, hence himself an American citizen. His application was denied by the Commissioner of Immigration at the port on the ground (1) that his status as a minor son of Chin Dun had not been proven, and (2) that he was an "alien ineligible to citizenship" under subdivision (c) of section 13 of the Immigration Act of 1924. He appealed to the Department of Labor at Washington. The Secretary of Labor found that the respondent was, at the time of his birth, the son of an American citizen, Chin Dun; but ordered his exclusion and deportation on the ground that he is nevertheless an alien ineligible to citizenship. (Rec. 7, 8). Whereupon the respondent applied to the District Court

of the United States for the Western District of Washington, Northern Division, for a writ of *habeas corpus*. (Rec. 2, 3). As the result of the hearing held on this application, the court ordered the respondent discharged. (Rec. 14, 15). The Government appealed to the Circuit Court of Appeals for the Ninth Circuit, assigning four causes of error, two of which only call for mention here: (1) the finding by the District Court that Chin Bow did not have a fair and impartial hearing; (2) the finding that Chin Bow was not subject to exclusion and deportation under the Immigration Law. (Rec. 16-19 incl.). The Circuit Court of Appeals, in the following opinion rendered on August 3, 1925, reported in 7 F. (2d) 369, decided that the respondent (then appellee) is a citizen of the United States by virtue of Section 1993 of the Revised Statutes of the United States, and that respondent's right to enter this country followed as a matter of course:

> Rudkin, Circuit Judge. "This is an appeal from an order allowing a writ of habeas corpus and granting a discharge. The appellee applied for admission to the United States as a citizen thereof, and as the minor son of a citizen. His claim of citizenship is based on section 1993 of the Revised Statutes which provides: 'All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.'
>
> The Government concedes that the appellee is the minor son of a citizen of the United States, but disputes his own claim to citizenship, for the reason that his father never resided in the United States

prior to the birth of the appellee, although the father has since become a resident and is now residing here. The application of the limitation found in the above section of the Revised Statutes to the facts before the court is the only question presented for our consideration. The statute refers to the descent of the rights of citizenship. The term "descend" has a well-defined meaning in law. As defined by Webster, it means: 'To pass down, as from generation to generation, or from ancester to heir.' If the term 'descend' is given that meaning in this connection, the status of the appellee would not become definitely fixed until his father became a resident of the United States or died without becoming such. In the former event he would become vested with all the rights of citizenship as soon as his father became a resident, while in the latter event his claim to citizenship would be forever lost. So far as we are advised, the limitation in question has never become the subject of judicial inquiry in a reported decision. The section was referred to incidentally in both the majority and dissenting opinions in United States v. Wong Kim Ark, 169 U. S. 649, although the direct question was not there involved. At page 691 the majority opinion quotes approvingly from an opinion of Secretary Fish to President Grant to the effect that section 1993 has conferred only a qualified citizenship upon the children of American fathers born without the jurisdiction of the United States, and has denied to them, what pertains to other American citizens, the right of transmitting citizenship to their children unless they shall have made themselves residents of the United States.

In the dissenting opinion, the Chief Justice was more specific. At page 714 he said: 'Section 1993 of the Revised Statutes provides that children so born "are declared to be citizens of the United

states; but the rights of citizenship shall not descend to children whose fathers never resided in the United States." Thus a limitation is prescribed on the passage of citizenship by descent beyond the second generation if then surrendered by permanent nonresidence, and this limitation was contained in all the acts from 1790 down.'

Again, at page 722, he said: 'By section 1993 of the Revised Statutes, the citizenship of the children of our citizens born abroad may be terminated in that generation by their persistent abandonment of their country.'

In accordance with these views, it would seem that the rights of citizenship of the appellee would only terminate by the death of his father without having to become a resident of the United States, and as the father became a resident of the United States during his lifetime and now resides here, the rights of his son as a citizen of the United States have become fixed, and his right to enter the United States follows therefrom as a matter of course.

The order of the court below is therefore affirmed" (Rec. 31, 32).

Following this decision, the Solicitor General presented a petition for a writ of certiorari to this Court. One of the five reasons for the issuance of the writ was stated in the petition to be that "the case involves an important question of federal law which has not been but should be settled by this court."

The petition was granted (Rec. 33), the writ issued, and the case is now before the Court on the merits of the petition.

The petition was filed with this Court on October 29, 1925. On November 16, 1925, the Circuit Court of Appeals

for the First Circuit rendered an opinion on a state of facts identical with that embraced in this action, reaching precisely the same conclusion as that reached by the Circuit Court of Appeals for the Ninth Circuit (*Johnson, U. S. Com'r,* v. *Sullivan, ex rel. Dea Gim Moy,* 8 F. (2d) 988).

Up to the present time all the Federal Courts which have passed upon the precise question—the Federal District Courts in Washington and Massachusetts, and the Circuit Courts of Appeal in the First and Ninth Circuits—have agreed that a person in the position of the petitioner is

(a) a citizen of the United States by virtue of section 1993, Revised Statutes, and entitled to admission to this country as a matter of course, and

(b) not an alien ineligible to citizenship under the Immigration Act of 1924.

Specification of Errors.

The specification of errors to be urged by the petitioner are, as stated on page 9 of the petition and brief, two in number:

> I. The Court erred in holding that children born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, but whose fathers have never resided in the United States at the time of their birth, are citizens of the United States within the meaning of Sec. 1993 of the Revised Statutes of the United States.

2. The Court erred in holding that the respondent was admissible to the United States as a citizen thereof under the provisions of Sec. 1993 of the Revised Statutes of the United States.

The Government does not deny that Section 1993 includes within the scope of its operation the foreign-born children of American citizens of the Chinese race, or of any other race. As to this point there appears to be no doubt that it reflects settled opinion (*Guan Hing Sun* v. *White*, 254 Fed. 402, C. C. A. 9th Ct., citing 230 Fed. Rep., pp. 534, 540, 746, 747, and 751; *Johnson, Ctr.* v. *Sullivan, ex rel. Dea Gim Moy*, 8 F. (2d) 988; 30 Op. Atty. Gen. 529). The American citizenship of the foreign-born father of the respondent by operation of the Statute is admitted.

It does not deny that had the father of the petitioner come to reside in the United States prior to the birth of the petitioner, the latter would, by the fact of such prior residence, be from the time of his birth vested with the rights of United States citizenship.

But the Government does deny that Section 1993 operates to vest with American citizenship, or with the rights of American citizenship, the foreign-born child of a foreign-born American citizen unless prior to the birth of his foreign-born child such foreign-born citizen had at some time resided in the United States. The contention is that such a child is born an alien, and must remain an alien unless naturalized by our courts or by some other method by which naturalization may be accomplished.

The respondent contends that it is not necessary, in order for these rights of citizenship to "descend" to such

non-resident foreign-born child, that the father shall have resided in the United States prior to the birth of the child; and that, where such residence takes place subsequent to such birth, these rights of citizenship vest in or "descend" to the absent child from the moment that the residence by the father in this country is a consummated fact.

The respondent further contends that the interpretation of the statute by the petitioner is unsound, as it is based upon a construction of the statute opposed to authoritative announcements of this Court, of other Federal Courts, of a State Court, of the Attorney General, of the Secretary of State, the Secretary of Labor, and rules of the Department of Labor.

ARGUMENT.

POINT I.

The interpretation placed by the Government upon Section 1993 of the Revised Statutes, i. e., that that Statute does not include within its Operation the Foreign-born Child of a Foreign-born American Citizen unless at the Time of the Birth of the Child the Father has Resided in the United States, cannot be sustained.

1. It is opposed to the ordinary meaning of the terms used.

The Statute reads as follows:

> "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

The words "whose fathers were or may be at the time of their birth citizens" of this country necessarily includes five types of fathers:

(a) The father who at the time of the birth of his foreign-born child was a native born citizen of the United States;

(b) The father who at the time of such birth had acquired his citizenship by naturalization proceedings;

(c) The father born abroad of American parents, and who, *prior* to the birth of his foreign-born child, had at some time resided in the United States;

(d) The father born abroad of American parents, and who, *subsequent* to the birth of his foreign-born child, has resided in the United States;

(e) The father born abroad of American parents who has "never" resided in the United States.

The father described in paragraph (d) is in the class to which it is admitted that the father of the petitioner belongs.

The first clause of Section 1993, then, "declares" in the simplest language that *all* children born abroad of the five classes of American fathers are born into American citizenship, and constitutes, standing alone, a full recognition and application of the doctrine of the *jus sanguinis* as to such foreign-born children.

However, the first clause is followed by the clause reading:

> "* * *; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

The outstanding features of this clause are "rights of citizenship" and their failure to "descend" from a father who "never" resided in the United States.

If we apply to the word "descend" its usual meaning having particularly in view its reference to the word "rights", we find that that meaning is "to pass by succession; as when the estate vests by operation of law in the heirs immediately upon the death of the ancestor" (Bouvier's Law Dict., 8th Ed., 1914, p. 852). If we give the

word "never" its usual meaning we find that meaning to be "not ever; not at any time; neither in the past, present or future, or referring either to the past or the future, as 'better late than never'" (Funk & Wagnalls' Standard Dictionary).

The words of the second clause, then, when given their natural and usual significance, announce that the *rights of citizenship* shall not pass by succession (of necessity to a foreign-born child) from a foreign-born American father who at the time of his death has never resided in the United States.

Ascribing to the words of the entire section their usual meaning and giving full weight to the context in the process, there is nothing to support the contention of the Government that "the rights of citizenship mentioned in the second clause 'descend' if at all, at the birth of the children" (petition, p. 18); i. e., that the "descent" takes place, not at the death of the ancestor, but upon the birth of the heir irrespective of whether the ancestor is living or dead. The contention that, in order for the foreign-born child *not to be born an alien*, the father must, *prior to his birth*, have resided in the United States, does equal violence to the meaning usually ascribed to the word "never" used in the second clause. The Government's contention denies to the word "never" its usual meaning as "not ever", "at no time", and arbitrarily attributes to it the meaning "not ever prior to a particular point of time"; i. e., the point of time at which the child was born.

2. The Government's construction is opposed to the Interpretation placed upon the proviso by Mr. Horace Binney, the authority "in accordance with whose suggestions" the Law of 1855 was enacted.

In 1853, Mr. Horace Binney published an article entitled *The Alienigenae of the United States*, with a preface bearing his signature (*United States* v. *Wong Kim Ark*, 169 U. S. 649, 665). At the time this paper was published the Act of April 14, 1802, was in force, and, like every preceding Act of Congress dealing with the question of the nationality (from the standpoint of the United States) of Americans born abroad, "restricted the right of citizenship thereby conferred upon foreign-born children of American citizens to those children themselves, *unless they became residents of the United States.*" (*United States* v. *Wong Kim Ark*, *supra*, p. 674; ital. vol.). In the Act of 1802, "the provision concerning foreign-born children, being expressly limited to the children of persons who were then or had been citizens, clearly did not include foreign-born children of a person who became a citizen since its enactment" (ibid, p. 673).

"Mr. Binney's paper," Justice Gray tells us, "as he states in his preface, was printed by him in the hope that Congress might supply this defect in our law." (ibid. p. 673). And the court adds that the section of the Act of February 10, 1855, c. 71, (Rev. Stat. 1993), (the purpose and intent of which this court is now requested to announce in connection with the petitioner's claim of right to enter the United States as a citizen thereof), was enacted "*in accordance with his* (Mr. Binney's) *suggestions*" (ibid, pp. 673, 674; ital. vol.).

In the preface to which Mr. Justice Gray alludes, Mr. Binney emphasizes as the great weakness of the then existing law that under it the children born abroad of American citizens who became such subsequent to April 15, 1802, were aliens. This was the mischief which it was the announced purpose of his article to remedy—a mischief which the Act of 1855, "enacted in accordance with his suggestion", must be assumed to have intended to remedy. Yet the government, at this late date, undertakes to establish the fact that a non-resident foreign-born child of an American citizen residing in this country is, in fact, an alien.

In presenting his views, Mr. Binney discussed the previous laws passed by Congress on the subject. On page 21 of the pamphlet, he points to the provision of the Act of March 26, 1790, c. 3 (1 Stat. 103, 104), in which, among other provisions, Congress, he states, enacted "That the children of citizens of the United States, that may be born beyond the sea, or out of the limits of the United States, shall be considered as natural-born citizens—with a proviso that the right of citizenship shall not descend to persons who had never been resident in the United States."

This Act was repealed by that of January 29, 1795, c. 20 (1 Stat. 415), but its third section "re-enacted the clauses of the Act of 26th of March, 1790, above referred to, in the same or precisely equivalent terms". (*Alienigenae, supra*, p. 23.) These clauses remained in force until the passage of the Act of April 14, 1802, which by its 4th section enacted the following provision (2 Stat. 153, 155):

> ". . . ; and the children of persons who now are or have been citizens of the United States shall, though born out of the limits and jurisdiction of the

> United States, be considered as citizens of the United States: Provided, that the right of citizenship shall not descend to persons whose fathers have never resided in the United States."

It will thus be observed that, from the first statute covering the subject matter down to and including the present law, the acquisition of the rights of citizenship by the children of American citizens born abroad by transmission from the father has been made to depend upon the one condition of residence in this country by the fathers of the children covered by the various statutes; and the terms in which this condition has been imposed have always been essentially the same.

The least that can be claimed with respect to the purpose of the enacting clause, forming part as it did of the specific legislation on the subject comprised in the Acts of 1790 and 1795, was to provide that the children of American citizens born abroad were, by virtue of birth alone, to be considered other than as aliens. "Considered as natural-born citizens" (Act of March 26, 1790); "Considered as citizens" (Act of January 29, 1795), are the terms used; while in the Act of February 10, 1855 (10 Stat. 604), the clause "shall be deemed and considered and are hereby declared to be citizens of the United States" is the language employed. The reason why the Act of 1855 was necessary was because the provision of the Act of April 14, 1802, conferring citizenship on foreign-born children was limited to the children of persons who at the time of or prior to the passage of the act were or had been American citizens. A strict construction of the Act of 1802 offered (in view of the express limitation) ground for the conten-

tion that the foreign-born children of American parents who had become citizens subsequent to the date of that Act might be considered aliens; and this was the "defect" in the law recognized by Mr. Binney, by Congress, and by this Court in the *Wong Kim Ark* case (169 U. S. 649), a defect which it was the undoubted purpose and effect of the Act of 1855 to overcome.

The effect of the proviso was given very careful consideration by Mr. Binney, whose conclusions as to its meaning are fortunately included in the following note which appears on page 22 of his pamphlet, and which is quoted only in part by Justice Gray in the *Wong Kim Ark* case (*ibid.* p. 665).

> "The expression is peculiar—'the right of citizenship shall not *descend*.' The right of citizenship never *descends* in the legal sense, either by the common law, or under the common naturalization Acts. It is incident to birth in the country, or it is given personally by statute. The child of an alien, if born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle. The writer's first impression from this language of the Proviso was that it meant to speak of the grant of citizenship to the foreign-born children of citizens as a descent cast upon *them* by the Act; and that the Proviso applied only to the children of natural-born citizens, or citizens naturalized under that Act, from which it perhaps followed, that *the enacting clause was intended* to be confined to such children only. *But the better construction seems to be, that the enacting clause is not so confined*, and that the Proviso was intended to prevent any foreign-born child who should be naturalized by the Act, from becoming a root or

stirps of citizenship to *his* foreign-born children, if *he* the foreign-born *father* of such children had never been resident in the United States. For, *as the foreign-born child of a native or naturalized citizen, is made a citizen, or naturalized, by the enacting clause, it follows that his foreign-born child is the child of a citizen* and so on successively in that line; *and that without some provision for residence in the United States by the respective fathers,* a race of foreign-born citizens might be propagated indefinitely *under the enacting clause*, with at length no relation to the United States but that of remote origin. The *Proviso* seems *therefore to have required residence of some kind, or to some extent, in the United States, without saying what or how long, by every foreign-born child who should be naturalized by the enacting clause*, before the citizenship of such foreign-born child should be permitted to *descend* upon his foreign-born children."

(*The Alienigenae of the United States under the present Naturalization Laws, supra, 2nd ed., pp. 21, 22. Italics largely volunteered.*)

This, then, is the construction placed upon the proviso by the jurist in accordance with whose suggestions the present Act was framed. It is no more than fair to assume that Congress approved of his construction, and adopted it as its own, since it used in the new legislation the precise terms in which the proviso was couched when part of the act in force at the time when Mr. Binney's article was published.

Two points are emphasized by Mr. Binney:

(1) That the children declared to be born into American citizenship by the enabling clause were not confined to the foreign-born children of native born or naturalized American citizens;

(2) That the purpose of the proviso was to effect a legislative announcement in the absence of which "a race of foreign-born citizens might be propagated indefinitely under the enacting clause with at length no relation to the United States but that of remote origin."

This purpose can be attributed to the proviso by ascribing to the word "descent" in connection with the phrase "rights of citizenship" its natural meaning, i. e., "a passage by succession". It was apparently in this sense that Van Dyne interpreted its terms when he wrote:

> "If the father was born abroad, and has always resided abroad, his child is not a citizen, for the statute expressly declares that 'the rights of citizenship shall not descend to children whose fathers never resided in the United States.' This limitation of the privileges of citizenship to the children of citizens who have resided in the United States *was designed to prevent the residence abroad of successive generations of persons claiming the privileges of American citizenship while evading its duties*". (Van Dyne, Citizenship in the United States, p. 34; ital. vol.)

3. The Government's interpretation is opposed to the construction placed upon Section 1993 by this Court.

After the approval of Mr. Binney's view, voiced by this court in the *Wong Kim Ark* case, it was to be expected that the court would, in the course of interpreting the statute, express itself on its own account more or less in accordance with that view.

Said Mr. Justice Gray, speaking for the majority:

> "It thus clearly appears that, during the half century intervening between 1802 and 1855, there was no legislation whatever for the citizenship of children born abroad, during that period, of American parents who had not become citizens of the United States before the act of 1802; and that the act of 1855, like every other act of Congress on the subject, has, by express proviso, *restricted the right of citizenship, thereby conferred upon foreign-born children of American citizens, to those children themselves, unless they became residents of the United States.*" (169 U. S. 674; ital. vol.)

Chief Justice Fuller states in his dissenting opinion:

> "Section 1993 of the Revised Statutes provides that children so born 'are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.' *Thus a limitation is prescribed on the passage of citizenship by descent beyond the second generation if then surrendered by permanent non-residence*, and this limitation was contained in all the acts from 1790 down. Section 2172 provides that such children shall 'be considered as citizens thereof'." (*Ibid.*, 714; ital. vol.).

and again:

> "By section 1993 of the Revised Statutes, the citizenship of the children of our citizens born abroad may be terminated in that generation *by their persistent abandonment* of their country; * * *" (Ibid, 722; ital. vol.).

The division of opinion between the majority of the Court on the one side, and the Chief Justice and Justice Harlan on the other, was not based upon any lack of agreement with respect to the meaning of Section 1993. The great question raised and decided was whether the doctrine of *jus sanguinis* could be considered as prevailing over the *jus soli*, when the persons affected were born within the territorial limits of the United States. The majority held that it could not thus prevail, although agreeing with the minority in its applicability within the limits set by section 1993 of the Revised Statutes.

4. The Government's interpretation is opposed to the construction placed upon Section 1993 by other courts, Federal and state.

Said the Circuit Court of Appeals for the First Circuit in the case of *John P. Johnson* v. *Sullivan, ex rel. Dea Gim Moy*, 8 F. (2) 988, where the facts were identical with those in this case:

> "This exact question was before the Court of Appeals for the Ninth Circuit in Weedin v. Chin Bow, and that court, in an opinion filed August 3, 1925, 7 F. (2nd) 369, reached the same conclusion as did the court below. A like result was reached by the Supreme Court of Iowa in 1876 in State v. Adams, 45 Ia. 99. No decision to the contrary is cited or known to this court.
>
> "A leading case on citizenship, its basis and incidents, is United States v. Wong Kim Ark, 169 U. S. 649. On pages 672-674 of that learned opinion by Mr. Justice Gray, are stated the origin and history of Rev. St. §1993.

"This statute was, in a slightly different form, enacted by our first Congress. Act of March 26, 1790, Chap. 3, 1 Stat. 103. It took its present form in 1855. 10 Stat. 604. It is no part of our Chinese Exclusion Laws; the policy of those laws throws no light on its proper construction. It must be construed in its general relation to American-born citizens, who, for business or other reasons, are on foreign soil when their children are born. It undertakes to extend the rights of citizenship to the foreign-born descendants of native-born citizens—a limited recognition of the doctrine of jus sanguinis, as distinguished from jus soli. Compare United States v. Wong Kim Ark, 169 U. S. 691; Cockburn, Nationality, 7. But if the second generation is permanently non-resident, such citizenship by descent ceases. Compare United States v. Wong Kim Ark, 169 U. S. 714. If Congress had intended citizenship should only descend to children whose fathers had had prior residence in the United States, it would naturally have made the proviso read:

'But the rights of citizenship shall not descend to children whose fathers had not resided in the United States prior to the birth of such children.'"

In the case of *State* v. *Adams*, 45 Iowa 99, it appeared that an American moved to Canada and there had a son, who married in Canada, and that a son was the fruit of that marriage; that son and grandson came to the United States. The court held that the grandson was a citizen of the United States.

5. The Government's interpretation is opposed to the construction placed upon Section 1993 by the Department of State.

The Government contends that the Department of State has taken the position that foreign-born children of American fathers who have not resided in the United States prior to the birth of such children are not citizens of the United States under the provisions of Section 1993. On page 9 of the Government Brief there is a reference to a passage in Borchard's "Diplomatic Protection of American Citizens Born Abroad." The passage reads:

> "It seems not to have been judicially determined whether the residence of the father in the United States must necessarily have preceded the birth of the child, but by the fact that the statute provides that citizenship shall not 'descend,' it is believed that the residence prescribed must have preceded the birth of the child, and such has been the construction of the Department." (p. 609.)

For reasons already given, no ground seems to exist for attributing so unusual a construction to the word 'descend.' But the actual point at issue is the alleged construction of the Department. This construction is ascribed to "Special Consular Instructions No. 340, July 27, 1914," addressed to the "American Diplomatic and Consular officers in China and Turkey," by Secretary of State Bryan (Govt's. Brief, p. 12).

It involved "the question of the citizenship of *persons born in China and Turkey, whose fathers were also born therein* and claimed American citizenship under the pro-

vision of Section 1993 of the Revised Statutes of the United States, *but had never resided in the United States*" (ital. vol.).

It seems that this question came up at this time in connection with the application of one Ben Zion Lilienthal, who was born in Jerusalem in 1883, whose father had never resided in the United States and whose grandfather was a naturalized citizen of this country. The case of Lilienthal was made the subject of an opinion by the Solicitor of the Department of State, and this opinion was issued by the Department, as an annex to the Instruction. It may be assumed, both from the wording of the Instruction and from that of the Solicitor's Opinion, that the father of Lilienthal was no longer living at the time the son applied for a passport to the United States.

> "The father of Lilienthal was a citizen of the United States under the laws of this government, for the reason that he was born son of a citizen of the United States who had resided in the United States.
>
> "It seems to me that the statement of facts that neither Lilienthal nor his father ever resided in the United States settles the question of Lilienthal's claim of United States citizenship against him." (*Compilation of Certain Departmental Circulars Relating to Citizenship, Registration of American Citizens, Issuance of Passports, etc.*, Washington, Gov't Printing Office, 1915, pp. 43, 44.)

The opinion of the Solicitor did not and could not undertake to pass upon the question whether, had the father of the applicant ever resided in the United States, that fact would have affected the son's claim of citizenship.

The situation did not and could not, without going out of the record, give rise to the question of the effect of such residence of the father before or after the birth of the applicant.

The obvious purpose of the instruction was to substitute (with respect to persons resident in China or Turkey in the position of Lilienthal) a new ruling for that which ever since August, 1887, had been the ruling of the Department with respect to persons so situated. Under those rulings, the Department had held that the descendants of parents or prior ancestors who had settled in distinctive American communities in countries where the United States claimed extra-territorial jurisdiction were the descendants of persons who had resided within the territory and jurisdiction of the United States within the meaning of Section 1993. This interpretation Mr. Bryan specifically overruled in Instruction No. 340; holding that residence in such communities was not residence in the United States within the meaning of the Statute. As already pointed out, the instruction was framed in order to meet a particular situation, and in its terms was limited to "Persons born in China or Turkey, whose fathers were also born therein * * * but had never resided in the United States."

"It is obvious," said the Secretary, "that persons of the class mentioned cannot claim American citizenship under the provisions of Section 1993 of the Revised Statutes, since their fathers had never resided in the United States when such persons were born." The government takes this statement of Mr. Bryan to mean that permanent non-residence of the foreign-born father after the birth of the foreign-born child was not required in order to bar out the child under Section 1993. But this conception over-

looks the fact that the opinion of the Solicitor submitted in support of the Instruction relies upon a passage from the decision of this court in the *Wong Kim Ark* case. He says:

> "I think Chief Justice Fuller in his dissenting opinion in the United States *v.* Wong Kim Ark, 169 U. S. 714, correctly interpreted the purpose of the last clause of Section 1993 when he said:
>
> "'By this section, a limitation is prescribed on the passage of citizenship by descent beyond the second generation, *of them surrendered by permanent non residence*, and this limitation was contained in all the acts from 1790 down.'
>
> "The majority opinion in that case does not announce a doctrine contrary to the conclusions above stated; * * *." (*Compilation of Departmental Circulars, etc., op. cit.* p. 45; ital. vol.)

The term "then surrendered" necessarily refers to the first moment of time "beyond the second generation"; for, in order to be permanent, non residence by the foreign-born father must extend to the time of his death—i. e., to the first point of time "beyond the second generation."

Summed up, the effect of this instruction is the following: Permanent non residence by a foreign-born American father is required under Section 1993 to cut off his foreign born son from the acquisition by descent of the rights of American citizenship. Residence by the foreign-born father in foreign communities in China and Turkey in which the United States exercises extra territorial jurisdiction is not residence within the limits and jurisdiction of the United States prescribed by the statute. The Lilienthal case is referred to by Professor C. C. Hyde (now Professor of International Law at Columbia University and recently

Solicitor of the Department of State) in the same paragraph in which he concludes that residence "at some time" by the foreign-born father suffices to transmit his rights of citizenship to his foreign-born son. The only effect which he ascribes to Mr. Bryan's instruction is that set out above. (See Hyde, International Law, etc., Vol. 1, p. 615.)

a. *Views of Mr. Fish, Secretary of State.*

Opposed to the suggestion of Dr. Borchard (himself formerly an Assistant Solicitor of the Department of State)—a suggestion which must depend, for whatever force it has, on his interpretation of the word "descend"—an interpretation which, in connection with Section 1993, appears to be opposed to the construction placed upon it by this court, other courts mentioned, and by Mr. Binney—are various authorities whose interpretations of the section are, both in words and spirit, in direct contradiction to that strained construction for which the Government contends. The standing of these authorities as experts in international law, no less than their intimate relation to the affairs of the Department of State, a connection covering many years, is such as to entitle their opinions to great respect—a respect all the more marked in view of the tribute paid to one of the ablest of them all, Secretary Hamilton Fish, by this Court in the *Wong Kim Ark* case. Says this Court:

> "In August, 1873, President Grant, in the exercise of the authority expressly conferred upon the President by art. 2, sect. 2 of the Constitution, to 'require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices,' required the opinions of the members of his

cabinet upon several questions of allegiance, naturalization and expatriation. Mr. Fish, in his opinion, which is entitled to much weight, as well from the circumstances under which it was rendered, as from its masterly treatment of the subject, said:

* * * * * *

"It is evident from the proviso in the act of 10th February, 1855, viz., "that the rights of citizenship shall not descend to persons whose fathers never resided in the United States," that the law-making power not only had in view this limit to the efficiency of its own municipal enactments in foreign jurisdiction; but that it has conferred only a qualified citizenship upon the children of American fathers born without the jurisdiction of the United States, and has denied to them, what pertains to other American citizens, the right of transmitting citizenship to their children, unless they shall have made themselves residents of the United States, or, in the language of the Fourteenth Amendment of the Constitution, have made themselves "subject to the jurisdiction thereof." " (169 U. S. 690, 691).

Section 1993 and its effects were again made the subject of comment by Mr. Fish in a letter to Mr. Washburne, June 28, 1873 (Foreign Relations, 1873, Part 1, p. 256):

"It is provided by the Act of 1855 (10 Stat. at Large, p. 604) that persons born out of the limits and jurisdiction of the United States, whose fathers at the time of their birth are citizens of the United States, shall be deemed and considered to be citizens of the United States, provided that the right of citizenship shall not descend to persons whose fathers never resided in the United States.

"I will presently refer to this proviso.

"Within the sovereignty and jurisdiction of the United States, the persons contemplated by the act are entitled to all the privileges of citizenship; but while the United States may by law fix or declare the conditions constituting citizenship within its own territorial jurisdiction, and may confer the rights of American citizenship everywhere upon persons who are not rightfully subject to the authority of any foreign country or government, it may be safely assumed that Congress did not contemplate the conferring of the full rights of citizenship upon the subject of a foreign nation who had not come within our territory, so as to interfere with the just rights of such nation to the government and control of its own subjects.

"It is a well-established principle of public law that the municipal laws of a state have no effect within the limits of another power, beyond such as the latter may think proper to concede to them.

"No foreign state can by its municipal legislation release from his obligation to the United States a person born within its territory and its jurisdiction who has continued from his birth to reside therein; and while he resides therein, and if, by the laws of the country of their birth, children of American citizens born in such country are subjects of its government, the legislation of the United States should not be construed so as to interfere with the allegiance which they owe to the country of their birth while they continue within its territory, or until they shall have relieved themselves of that allegiance and have assumed their rights of American citizenship, in conformity with the laws and Constitution of the country, and have brought themselves personally within its jurisdiction.

"I have above referred to the proviso to the Act of 1855. It is evident from this that the law-mak-

ing power not only had in view the limit (above referred to) to the efficiency of municipal law in foreign jurisdiction, but intended that a distinction be observed between the right of citizenship, declared by the Act of 1855, and the full citizenship of persons born within the territory and jurisdiction of the United States, for those declared to be citizens by the act could not transmit citizenship to their children without having become residents within the United States; the *heritable blood of citizenship was thus associated unmistakably with residence within the country, which was thus recognized as essential to full citizenship.*" (Moore, *Int. Law. Dig.*, Vol. 3, pp. 282-283; ital. vol.)

Continuing:

"If, on the one hand, the government assumes the duty of protecting his rights and his privileges, on the other hand, the citizen is supposed to be ever ready to place his fortune and even his life at its service, should the public necessities demand such a sacrifice. If, instead of doing this, he permanently withdraws his person from the national jurisdiction, if he places his property where it cannot be made to contribute to the national necessities; if his children are born and reared upon a foreign soil, with no purpose of returning to submit to the jurisdiction of the United States, then, in accordance with the principles laid down by Chief Justice Marshall, and recognized in the 14th Amendment, he has so far expatriated himself as to relieve this government from the obligation of interference for his protection." (*Foreign Relations*, 1873, Part 1, p. 259.)

According to the view of Secretary Fish, cited with approval by this Court in the *Wong Kim Ark* case, the Amer-

ican father, foreign-born, is himself, as an American Citizen, born with the power to exercise the right of transmitting citizenship to his foreign-born children. The power to exercise the right is made by the statute to depend on one condition only—the residence of the father in this country. By such residence his status of "qualified citizenship" is removed, and he becomes vested with all the rights of American citizenship. Among these is that of transmitting citizenship to his children—a right which, as Mr. Fish states "pertains to other American citizens." The rational meaning to be attributed both to the words of that statute, and Mr. Fish's interpretation of it, is that permanent non-residence on the part of the foreign-born father is the only obstacle to the maturity and operation of the right. This is the construction placed upon the statute both by Justice Gray and Chief Justice Fuller in the *Wong Kim Ark* case, who, although entertaining different views on the main issue involved in that case, were in accord as to the meaning and purpose of Section 1993.

In the words of Justice Gray, the statute "restricted the right of citizenship thereby conferred upon foreign-born children of American citizens to those children themselves unless they became residents of the United States" (169 U. S. 674). The natural and necessary inference conveyed by these words is that if such children become residents of the United States, the right of citizenship is conferred upon *their* foreign-born children. And, according to Chief Justice Fuller, the statute places a limitation upon the passage of the right of citizenship by descent beyond the second generation "if then surrendered by permanent non-residence" (169 U. S. 714).

It is then by *permanent* non-residence only that the right to transmit citizenship is surrendered. In this case, the father of the petitioner (although a comparatively young man) has for some years been residing in this country and submitting himself to its legiance and jurisdiction in his avowed and recognized status as a citizen of the United States.

If the view of Secretary Fish is sound; if the residence in this country by a foreign-born American citizen vests him with all the rights of citizenship, including that of transmitting citizenship to his children,—a right which "pertains to other American citizens"—the contention of the government is surely unsound; for it announces the proposition that an American citizen born abroad, who in pursuance of his allegiance comes to reside in his native land, can never acquire the full rights of citizenship enjoyed by his countrymen if by chance he has had a son or sons born to him abroad prior to his coming here. It is a curtailment of those complete rights of citizenship which Secretary Fish announced to be the purpose of the second clause of section 1993 to confer upon such a father, once he established his residence here.

The right to transmit the rights of citizenship does not, under this construction, arise at the time of the birth of the foreign-born child, as the government contends. It is made, says Secretary Fish, in effect, to depend upon one condition and one only—the acquisition of residence by the father in this country. Hence, the date of the transmission of such rights to the foreign-born child must be coincident with that of the coming into existence of the power in

the father. The right to transmit those rights of citizenship, once established and brought into being by the acquisition of a residence by the foreign-born father (the only condition requisite to the passage of the right by transmission) may, for the want of a better term, be designated as blood heritable for the purpose of the transmission of such rights. The statutory requisites are then fulfilled no more and no less by a son born prior to the residence of the father in this country than by such children as may be born subsequent to the acquisition of such residence.

Such are the conclusions which we feel must necessarily be drawn from the language in which Secretary Fish's interpretation of Section 1993 is expressed.

b. *Views of Mr. Van Dyne.*

Mr. Frederick Van Dyne, while Assistant Solicitor of the Department of State, published his well-known work *Citizenship of the United States*. The Government (Brief, p. 9) ascribes to Van Dyne the opinion that in order for the rights of citizenship to descend to the foreign-born child, the foreign-born father must have resided in this country prior to the child's birth. We can find nothing in the text (pp. 33-34) to justify this conclusion. After quoting Section 1993 the author says:

> "Under this statute the concurrence of two facts is necessary to confer American citizenship upon a child born abroad: (1) The father, *at the time of the birth of the child*, must be a citizen of the United States, (2) The father must at some time have resided in the United States." (p. 33; ital. vol.)

c. *Views of Professor Charles Cheney Hyde* (Sometime Solicitor of Department of State).

> "By right of blood, *jure sanguinis*, a child may at birth acquire the nationality of its father. Numerous states regard as their respective nationals children born to their own subjects or citizens in foreign lands. The United States makes such a claim, conferring its citizenship as well as its nationality upon children born under the following conditions specified in the Act of Congress of February 2, 1855. * * * The two conditions thus made essential to the acquisition of American citizenship by birth, in the case of a child born outside of the limits and jurisdiction of the United States are, the American citizenship of the father *at the time of the birth of the child*, and the residence of the father *at some time* within the United States." (*International Law chiefly as Interpreted and Applied by the United States*, Vol. 1, p. 615; ital. vol.)

d. "*Letter from the Secretary of State on Citizenship of the United States, Expatriation and Protection abroad.*"

Probably the most complete statement ever issued by the Department of State on citizenship and the kindred subjects of expatriation and protection of citizens abroad is the above entitled document (59th Congress, 2nd Session, H. Doc. No. 326, Washington, 1906), which was transmitted by the Secretary of State to Congress just before and in contemplation of the passage of the Act of March 2, 1907 entitled *An Act in reference to the expatriation of citizens and their protection abroad*. This report, in the words of the Attorney General, "appears to have been the genesis"

of the Act of March 2, 1907. (30 Op. Atty. Gen. 534.) It came into existence as the result of the following order:

> "Department of State,
> Washington, July 3, 1906.
>
> It is ordered that a board be convened at the Department of State in the City of Washington on the 9th day of July, 1906, to inquire into the laws and practice regarding citizenship of the United States, expatriation and protection abroad, and to report recommendations for legislation to be laid before Congress at the next Session, pursuant to the recommendation of the Committee on Foreign Affairs of the House of Representatives contained in the report of the Committee dated June 6, 1906, on Senate Resolution 30, 59th Congress, 1st Session.
>
> The Board will be composed of James B. Scott, Esquire, Solicitor for the Department of State; David Jayne Hill, Esquire, Minister to the Netherlands, and Gaillard Hunt, Esquire, Chief of the Passport Bureau, Department of State. * * *
>
> Robert Bacon,
> Acting Secretary."

(*Foreign Relations*, 1906, Part 1, p. 4.)

In this document under the heading "Part I—*Citizenship by Birth. Chapter 2. Children Born Abroad. Section 1. Of American Parents Permanently Residing Abroad*" and under the special caption: "*Grandchild Cases*," the proviso of Section 1993 is discussed in the following terms:

> "That provision of the Statute which declares the necessity for a residence in this country at some

time of the father of such foreign born children has been before the court in a number of interesting cases. The earliest is that of Brazizas against Hopkins * * * The court declared that the Brazizas were not citizens; that their grandmother by marrying an Englishman became an English subject; that their mother thus became a British subject, and that, of course, the two sons could not under this view be American citizens. Moreover, if this had not been true, still the mother, never having been in the United States, had not brought herself within the language of the Statute.

The question was again before the courts in the case of State *v.* Adams, 1876, 45 Iowa, 99, where it appeared that a man (whether married or unmarried is not stated) moved to Canada and there had a son, who married in Canada, presumably an alien, and himself had a son. Son and grandson came to the United States. The court held that the grandson was a citizen. The situation was before the courts for consideration the third time, in Brown *v.* Dexter, 1884, 66 Cal. 89, in which it appeared that husband and wife, both American citizens, moved to Canada, * * * had a son, who later married, presumably an alien, and had a son, the petitioner. Three months before the petitioner's birth his father swore allegiance to the Queen of England. Later the father and the petitioner came to the United States. The petitioner applied for registration, which was refused, when he filed this petition for a mandamus. The court denied his petition on the ground that he was not a citizen of the United States. This case is, of course, distinguishable from State *v.* Adams, since here the father had become a subject of Great Britain. But taking the oath of allegiance has been held not to amount to an act of expatriation.

See cases Part III, Chapter II, Section 2, A, and under such a view the case may be questioned." (p. 78.)

It will be noted that the Department construes Section 1993 as requiring, not that the foreign-born father shall have resided in the United States *prior to the birth* of the foreign-born child, but merely that the father shall have a residence in this country *at some time*. Further that, in a case where the foreign-born father came to this country for the first time bringing with him his foreign-born son, having, however, three months prior to such residence sworn allegiance to the Queen of England, it was, in the view of the Department, questionable as to whether the court was right in holding that the act of the father in taking the oath of allegiance necessarily amounted to an act of expatriation, and hence could necessarily be held to prevent the acquisition of a full citizenship status by the son when the father finally came to reside in this country. This passage seems to constitute a very definite recognition by the Department of State that, under Section 1993, the vesting of the rights of citizenship in the foreign-born minor son of a foreign-born American father occurs as the result of and contemporaneously with the coming of the father to reside in this country, irrespective of the time when that residence occurs with relation to the date of the birth of the son.

As far as this important document constitutes evidence of the Departmental interpretation of Section 1993, that interpretation would appear to be wholly at variance with the strained and drastic construction which the Government attempts to justify in connection with its reading of the

statute. In this "Letter" we find further reference to "grandchild" cases, to which allusion has already been made. Under the heading "*Extra territoriality as Affecting Questions of Nationality and Citizenship*" together with sub-heading "*Loss of Citizenship*" we find the following:

> "The important rulings of the Department on this subject grew out of the application for the registration of two children in the American Consulate at Smyrna. One child was the grandchild of an American citizen, the father of the child never having resided in the United States within the meaning of Section 1993; the other child was the grandchild of a naturalized Turk, his father being in like case. On March 30, 1887, the Department wrote Consul Emmet approving his action in refusing the registration of these children on the ground that they had lost all claim to American citizenship. Later, however, after the consideration of the very able protest prepared by several prominent American citizens residing in Smyrna, and after a careful study of the whole question of extra-territoriality (see instruction of Department to Mr. Straus, April 20, 1887, *Foreign Relations*, 1887, p. 1094), the Department changed its position so far as concerned the grandchild of the native born American * * *." (p. 211.)
>
> "The result of these various cases would seem to be that while the Department recognizes an exception to the general language of Section 1993, as regards the descendants of American citizens in general, living in countries in which the United States exercises extra-territorial powers, it refuses to extend this exception to the children of naturalized Americans returning to the country of their origin." (p. 213.)

It will be understood that the last preceding extracts have been quoted, not because it is conceived that they are *in pari materia* with the case of the petitioner whose father has for years been residing in the United States, but merely to show the construction placed upon the statute by the Department under Secretary Bayard; and further to show how entirely opposed to the point of view attributed to it by the Government was the attitude of the Department of State; as was the *practice* of that Department at the time when, and for many years prior to the time when this comprehensive document was, in 1906, prepared for the use of Congress by Acting Secretary of State Bacon.

The policy of the Department of State which, it may be safely concluded, was based upon its understanding of the real purpose and meaning of Section 1993 of the Revised Statutes, is expressed in the following terms:

> "The separate registration of male children of American citizens who have reached the age of eighteen years and who have either been born and lived all their lives abroad or have spent a long period of time in a foreign country is made expedient by the fact that it is at this age that, in several foreign countries, they become liable to military service. In the case of such children it is our national policy to claim them as American citizens, without regard to the place of their birth, as the offspring of American citizens; to protect them as such until they are twenty one years of age and to permit them on attaining their majority to choose whether they will remain American citizens or not." (From "Recommendations and Observations," "Letter," p. 17.)

6. The Government's interpretation is opposed to the Construction of the Statute as evidenced by the Practice, Rules and Formal Announcements of the Department of Labor.

The petitioner asserts on page 17 of his brief in support of the petition for *certiorari* that

> "Until recently the Department of Labor has never had occasion to rule directly upon the residence prescribed in Section 1993, inasmuch as children in the position of the respondent were admitted to the United States as minor children of American citizens prior to the Immigration Act of 1924." (See Govt's. Brief on this argument, p. 12.)

If what is meant by the above is that the minor children of American citizens of Chinese descent were not considered and passed upon, prior to the Immigration Act of 1924, by the officials of the Department of Labor as American citizens, and if found to be the children of American citizens were not admitted as themselves American citizens, the statement is inaccurate. To quote from the brief of counsel presented in opposition to the granting of the petition for *certiorari* (p. 11) the statement

> "* * * is based upon partial misapprehension. It is true that the Department of Labor never, until after the passage of the Immigration Act of 1924, issued any formal instructions or rendered any formal decisions to the effect that foreign-born children should be recognized as citizens only if their fathers had resided in the United States prior to the children's birth. But it is not true that such children were, prior to the passage of the 1924 Act 'admitted to the United States as minor children of American

citizens.' As is well known to all having any extended practical experience in the administration of the Chinese exclusion laws, it never occurred to the department until after the passage of said act that such children, majors or minors, might be subject to exclusion as aliens; and no instructions to the contrary ever having been given by the department, numbers of such children were admitted at the various ports of entry as citizens. To demonstrate this it is only necessary to refer to the official reports of the Department of Labor covering recent years. Examination, for example, of the Annual Report of the Commissioner General of Immigration for the fiscal year 1924 (p. 154) shows that in Table 1, entitled 'Chinese seeking admission to the United States, fiscal year ended June 30, 1924, by classes and ports,' Chinese applicants are divided into fifteen classes, six of which are United States' citizens, wives of United States citizens, section 6 merchants, returning merchants, merchants' wives, merchants' children. There is no separate classification of children of United States citizens. Why? Obviously because they were being regarded by all concerned and admitted by the Immigration officials, irrespective of place or time of birth, or age, as United States citizens. The same classification is followed in Table 2 (p. 156); and while Table 3 (p. 157), concerning 'Chinese claiming American citizenship by birth, or to be the wives or children of American citizens,' separates the citizens into 'native born' and 'foreign born children of natives,' a simple calculation will show that the total of those two segregations is embraced within the total number of United States citizens given in other tables—further confirmation of the fact that all foreign born children of citizens have been admitted as citizens."

If we consult the report of the Secretary of Labor for 1924 with particular reference to the question as to how, in the opinion of the Department of Labor, the Immigration Act of 1924 affected Chinese immigration, we find every indication that when that report was written there was no thought in the mind of the Secretary that Section 1993 was susceptible of the construction that under it the foreign-born child of an American citizen of Chinese descent was an alien.

> "The Immigration Act of 1924, which was approved May 26, 1924, and became generally effective July 1, 1924, has materially affected Chinese immigration. This is made so because of the inhibitions contained in this act against the coming to the United States of a number of classes of persons of *races ineligible to citizenship* who were formerly admissible under the Chinese immigration treaty of 1880, the various Chinese exclusion laws enacted subsequent to that time, and likewise the numerous court decisions under these laws upon which the Department has been operating. Briefly stated, the most important change is found in the fact that under the Immigration Act of 1924 the following classes of persons can no longer come to the United States solely because of their relationship to persons in the United States, such classes formerly being admissible: (1) the wives and children of alien Chinese merchants (either already domiciled in this country or coming here temporarily under the present law), (2) the wives of United States citizens of the Chinese race, (3) the adopted children of either merchants or citizens, and (4) the wives and children of certain classes of Chinese persons who may come here temporarily, students, and the like." (*Annual Report, Secretary of Labor for* 1924, pp. 56-57).

There is still another passage in this report which is of interest:

> "The courts have held that the foreign-born children of American citizens of the Chinese race are themselves citizens and may come here as such at any time provided that they have not taken acts of expatriation." (*Ibid* p. 168).

There is no suggestion in this report, published subsequent to the going into effect of the Immigration Act of 1924, that there existed in the mind of the Secretary any exception to the general rule which had been recognized and put into practice for years by the Department, namely, that *all* foreign-born minor children of American citizens of the Chinese race whose fathers have at any time resided in the United States are themselves admissible as American citizens.

The principle that the foreign-born child of an American citizen of the Chinese race is a citizen under Section 1993 of the Revised Statutes was first accepted by the Department of Labor many years ago. On October 15, 1915, a departmental rule was, however, promulgated which provided that "the dependent members of the household of a Chinese-American citizen may be admitted to the United States" upon the establishment of certain conditions with respect to age, presumed membership in the father's household, etc. Under this rule the Department sought to exclude those who it conceded to be sons of Chinese-American citizens, but who did not come within the conditions prescribed in the rule. These cases of unwarranted exclusion were taken before the courts, and without an exception the rule was found to have no legal authority to support it. These decisions, from which the

following quotations are taken, dealt in some instances with foreign-born fathers who, when they were admitted here, already had foreign-born children in China.

In the case of *ex parte Wong Foo*, 230 Fed. 534, the Secretary of Labor had contended that

> "* * * inasmuch as the father's sense of allegiance is clearly to the country of his ancestors, and not to this country, which is true also of the applicant who has lived all his life (28 years) in that country (China) the doubt should be resolved against naturalizing the applicant under the Statute, by which alone he may claim admission into the United States."

The court said (p. 535):

> "If the applicant is in reality the son of an American citizen, even though it be a citizen of Chinese descent, he is also such citizen, and entitled to enter this country as such."

and overruled the demurrer to the petition for a writ of *habeas corpus*.

The decision in *ex parte Leong Wah Jam*, 230 Fed. 540, involved the case of the son born in China of a father who had been born in the United States. The son had lived there for twenty-four years and raised a family there. The Department of Labor had refused him admission under the rule of 1915 on a finding of a "lack of spirit of American allegiance" on the part of both father and son. Here, again, the demurrer to the petition for a writ of *habeas corpus* was overruled.

In another case the facts show that the father of the applicant had lived in the United States all his life. The applicant had a family in China. He was excluded because

the immigration officer at the port believed him not "entitled to take advantage of the technical wording of the law entitling foreign born children of American parents to admission in this country". The court said:

> "The view that the citizenship of a person of the Chinese race, who, though born in China, is the son of a native born American citizen, is a 'technical' instead of a real one, seems to have originated in the Bureau at Washington, * * *. If the right of the applicant to land is to be made dependent upon the opinion of some officer that the father should have taken more advantage of his rights as an American citizen than to live in this country, then the record should clearly show wherein the father was delinquent in this regard." (*ex parte Tom Toy Tin*, 230 Fed. 747, 749).

The same result was reached in *ex parte Lee Dung Moo*, 230 Fed. 746, 747, where the facts were analogous, and the court said:

> "If applicant (who has never been in the United States) is the son of a resident American citizen, he, too, is a citizen, and entitled to every right as such."

The 1915 Departmental Rule was, therefore, repealed, and by Rule 9a of the Rules relating to the Admission of Chinese (Rules of May 1, 1917) the Department of Labor acknowledged the soundness of the doctrine from which it had endeavored to stray.

In the case of *Quan Hing Sun* v. *White*, 254 Fed. 402, 404 (C. C. A., 9th), the Court said, referring to Section 1993:

> "This statute applies to all persons alike, without any discrimination as to race or place of birth".

Again, at p. 405:

> "We know of no law making a race distinction in American citizenship, and by reason of such distinction excluding the sons of citizens of the United States of Chinese birth * * *."

Commenting on the new rule adopted by the Department of Labor on May 1, 1917, in which the restrictive conditions contained in the old rule of 1915 were omitted, the court continued:

> "That there is no such law is practically admitted by the Department of Labor in the adoption of new rules in which these conditions are omitted. 'The lawful children of an American citizen of the Chinese race partake of their father's citizenship, and are entitled to admission into the United States'."

And the court, at page 406, refers with approval to 230 Fed. pp. 534, 540, 746, 747 and 751 (*ante*, pp. 42, 43).

In the third edition (October, 1920) of the Departmental Rules dealing with the admission and exclusion of Chinese the rule appears in a slightly altered form:

> "Rule 9-a. Subdivision 1.
>
> The lawful wife of an American citizen of the Chinese race may be admitted for the purpose of joining her husband, and *the lawful children of such a citizen partake of his citizenship and are therefore entitled to admission.*" (*Ital. ours.*)

The restrictive provisions of the old rule of 1915 were held invalid, in a lengthy and well-reasoned opinion of Attor-

ney General Gregory. He says, speaking with reference to Section 1993:

> "It is to be observed that the statute employs the term '*all children.*' Under well established rules of construction, if the statute is to be limited to children other than Chinese, such exception must be made by Congress. It cannot be supplied by interpretation" (30 Op. Atty. Gen. 529, 530).

7. The Government's Interpretation is Opposed to the Views of Attorney General Hoar.

> "That fact (that the fathers of certain applicants for American passports were at the time of their birth citizens of the United States) being established, the children, under and by virtue of the Act of Congress of February 10, 1855, Chap. 71, are deemed and considered, and are thereby declared, to be citizens of the United States, 'provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States'. If, therefore the fathers of the applicants, *at the time* of their birth, were citizens of the United States, and had *at some time* resided within the United States, it is my opinion that the applicants are citizens of the United States, under the provisions of the Statute, and entitled to all the privileges of citizenship which it is within the power of the United States Government to confer. Within the sovereignty and jurisdiction of this nation, they are undoubtedly entitled to all the privileges of citizens." (Mr. Hoar to Mr. Fish, 13 Opp. Atty. Gen. 90, 91; ital. vol.)

The term "some time" with reference to the residence of the father in this country seems to have been deliberately

used for the purpose of contrast in connection with the term "at the time", with reference to the birth of the applicants. As already pointed out, the same terms are used with the same apparent purpose of contrast by Professor Hyde and Mr. Van Dyne (*ante*, pp. 31, 32). The view now urged by the Department of Justice seems, therefore, to conflict with the opinion of Mr. Hoar, as Attorney General, to which repeated allusions are made in the *Foreign Relations of the United States*.

The view of an eminent English authority on this point is not without interest:

> "In the second place, by Section 1993 of the Revised Statutes, a child born out of the limits and jurisdiction of the United States, but whose father was at the time a citizen, and has *at some time or other* resided within the United States, will himself be entitled to citizenship." (Pitt Corbett, *Leading Cases on International Law*, Vol. I, p. 183, Fourth Ed. by Bellot, 1922.)

8. There is nothing in the Act of March 2, 1907, to indicate a legislative declaration that the residence prescribed in Section 1993 Revised Statutes must occur prior to the birth of the foreign born child.

In the first place there is nothing to substantiate the contention of the Government that Section 6 of the Act of March 2, 1907, is a statute *in pari materia* with Section 1993, as to the *acquisition* of citizenship. The first clause of that section merely declares a certain class of persons to be born into the status of American citizenship. Section 6 of the Act of March 2, 1907, has nothing to do with the acquisition of citizenship, but, on the contrary concerns

itself only with question of the conditions under which children residing abroad, who are declared American citizens under Section 1993, may, if they remain abroad after reaching a certain age, receive, as of their own right, the protection of this government.

That Section 6 of the Act of March 2, 1907, cannot be construed as *in pari materia* with the first clause of Section 1993 with respect to the acquisition of citizenship appears (apart from a comparison of the two laws) from the Department's circular instruction of March 14, 1911, addressed to the diplomatic and consular officers of the United States, in which they are informed that

> "the declaration of 'intention to become residents and remain citizens of the United States' required therein have reference to the right of protection rather than citizenship under municipal law." (Department of State No. 16. General Instruction. Consular.)

On the other hand it may be stated that Section 6 of the Act of 1907 deals in part, as the proviso of Section 1993 deals wholly, with the "rights of citizenship" of persons born and residing abroad and who have never been in this country. Both legal provisions impose limitations upon the enjoyment of rights which ordinarily go hand in hand with the national status of persons residing abroad; i. e., the right of children born to American citizens abroad to the protection of the United States while residing abroad.

Under that proviso, as we understand it to have been construed by Secretary Fish, and as we conceive that construction to have been confirmed and approved by this court in the *Wong Kim Ark* case, the residence in this coun-

try of a foreign born American father brought with it the transmission of the rights of citizenship to his foreign born son, although still resident abroad, provided, of course, that the father's residence occurs during the minority of the child or before the son, as an adult, has acquired an independent status of his own (see *post*, p. 57). Up to the time of such residence by the father the son has occupied the status of one born into his father's citizenship under the first clause of Section 1993, but the status was inchoate and he could claim no "*rights of citizenship*" by transmission from the father. Under the *proviso*, these rights came into being with the fact of residence, and under that *proviso* there was apparently no time limit set upon their enjoyment by the son, although he might remain a constant resident abroad. He would appear to have become permanently vested by such residence, with the right to protection while abroad. But the sum of these rights which he, as a foreign resident, could enjoy is expressed by the word "protection". So matters stood until the passage of the Act of 1907, Section 6 of which provides that "all children declared to be citizens under Section 1993, *and who continue to reside outside the United States, shall, in order to receive the protection of this Government*", be required at the age of 18 years to register their intention.

This is required, be it noted, of "all children"—children whose fathers were citizens at the time of their birth, whether native-born fathers or foreign-born fathers. The enjoyment of the "rights of citizenship" by the foreign-born son of an American father resident abroad was after he had reached a certain age, made to depend, *not* upon the transmission to him of these rights by the fact of his father's residence in this country, but whether, on reach-

ing an age when he was no longer the "child" born into his father's national status, he met the requirements of the Act of March 2, 1907.

What we consider to be the fallacy of the Government's argument in favor of the proposition that the act of March 2, 1907, has to do with citizenship as opposed to protection, arises from the fact that the Government fails to perceive the distinction between "citizenship" and "rights of citizenship" so manifestly emphasized in Section 1993, and so clearly recognized by Secretary Fish.

This misconception is made plain by the statement that "If the residence prescribed may occur after the birth of the children, the father may not have resided in the United States until long after such children attain their majority. Clearly, they could not register or take the oath of allegiance, since 'the rights of citizenship shall not descend to children whose fathers never resided in the United States.' * * * Nor could such children 'remain citizens' since they are expressly denied the rights of citizenship" (Govt's Brief, pp. 15, 16).

The Government fails to perceive that the registration, or the taking of the oath, is not the exercise of a right of citizenship purporting to be transmitted by a foreign-born father. It is an act which the son may perform if he chooses, as the result of having been born into the status of his American father—as the result of having been "declared" to be an American citizen. Because he is born into this status, this Government has adopted this policy with respect to him. He goes through the ceremony, not as an evidence of an existing transmitted right, but in order to establish an individual right of citizenship; *i. e.* the right of protection abroad due one who, born into the national

status of his American father under section 1993 of the Revised Statutes, has elected a national status of his own by complying with the requirements of the Act of March 2, 1907.

9. The Government's interpretation finds no support in the decision of this Court in the case of *Chang Chan* v. *Nagle*.

It is stated on page 17 of the brief on the petition for *certiorari* that section 13 (c) of the Immigration Act of 1924 expressly excludes children in the position of the petitioner from admission as minor children of American citizens of Chinese descent; and in support of this statement cites the case of *Chang Chan* v. *Nagle*, 268 U. S. 346.

This statement would appear to have been a complete inadvertence, as—unless a child declared by Section 1993 to be a citizen be assumed to be the "alien" of section (c) of the Immigration Act—there is no reference of any kind to the minor children of American citizens of Chinese descent; and as to the *Chang Chan* case, the only issue involved was the right of Chinese wives of American citizens to enter this country. Neither the right of a minor son of an American citizen to enter, nor any phase of Section 1993, constituted an issue involved in the case, nor was either in any way referred to, considered or passed upon by this Court. The case does not appear in the Government's brief on this argument.

10. The Government's interpretation would lead to incongruous and absurd results never contemplated by Congress.

Aside from the above considerations, the interpretation which the Government puts upon Section 1993 necessarily leads to incongruous results. Such an interpretation would make it impossible for the foreign-born son of a foreign-born American citizen who had not resided in the United States until subsequent to the birth of his son, to acquire citizenship except by the naturalization process prescribed for our courts. It would make possible the ludicrous and illogical spectacle of an American father entering the United States with his children, himself a citizen, and surrounding himself with a family of aliens as members of his immediate household. Again, assuming such a father to have a foreign-born family, and to have been blessed with one child born abroad after the father's arrival here, his youngest born would be a full-fledged citizen of the United States, and all the older children foreigners. Not only this, but, "the right of transmitting citizenship to their children" which, as Mr. Fish points out, pertains to all American citizens who have resided in this country, would be denied the father, as would the benefits thereof be denied to all but the youngest child.

Under the construction placed on the act by the Government, no American citizen born abroad who has had children born to him abroad before coming to the United States to live could ever acquire the full rights of citizenship since, under such interpretation, he could never exercise and would have lost forever the right to transmit his citizenship to his foreign-born children. That Congress

ever entertained any such intention, is certainly extremely questionable.

Finally, this interpretation, which ascribes to the foreign-born son of an American citizen the status of alienage would seem to be opposed to the very purpose and intention of the Act of 1855, if that act, as this Court in effect tells us, reflected the purpose of Mr. Binney's article on the *Alienigenae*, which was to prevent the child of an American citizen born abroad from being born an alien. The provision concerning foreign-born children in the Act of April 14, 1802, "being expressly limited to the children and persons who then were or had been citizens, clearly did not include foreign-born children of any person who became a citizen since its enactment. * * * Mr. Binney's paper, as he states in his preface, was printed by him *in the hope that Congress might supply this defect in our law.*" (*U. S. v. Wong Kim Ark*, 169 U. S. at 673; ital. vol.)

POINT II.

Under Section 1993 the Respondent was Born Abroad into the National Status of his Father, and While Still Residing Abroad Became Vested (through his Father) with the Rights of Citizenship as the Result of the Father's Residence in the United States Beginning in 1922.

The Enacting Clause.

Under the enacting clause of the statute all children born abroad to fathers who at the time of their birth are American citizens are declared to be citizens. The enacting clause is not confined to the foreign-born children of

natural-born citizens (see Binney, *op. cit.*, note p. 21). It follows that one of the purposes of the statute as revealed by this clause was to prevent from being born into alienage (1) the foreign-born children of native-born or naturalized American citizens, (2) the foreign-born offspring of such foreign-born children.

The clause constitutes a simple declaration of the application of *jus sanguinis* to the case of *all* children born abroad whose fathers were at their birth citizens of the United States. That rule expressed in its simplest terms declares that the child partakes at birth of the nationality of the father. Although no general rule of citizenship by blood or descent has displaced in this country the fundamental rule of citizenship by birth within its sovereignty, all of our acts on citizenship, from the Act of 1790 down, have recognized the doctrine of the passage of citizenship by descent within the limitations prescribed by such legislation (*Wong Kim Ark*, *supra*, pp. 674, 714). And although, in the *Wong Kim Ark* case, this Court refused to concede that there was any settled and definite rule of international law, generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion (*Wong Kim Ark*, *supra*, p. 667) there is nothing in that decision to suggest a denial of the existence of the doctrine.

But for its recognition as an existent principle of public law, there would be no justification for the equally well recognized doctrine of dual nationality, or dual allegiance, which arises by reason of the concurrent operation of the *jus soli* and the *jus sanguinis* (Borchard, *op. cit.*, p. 475).

> "This condition," says Moore, speaking of foreign-born children and double allegiance under the

> Act of 1855, "naturally arises when a person is born in one country to a father who is a citizen of another country. By rules of municipal law, which generally prevail, such a person has two citizenships by birth —(1) citizenship by virtue of the place of birth (*jure soli*), and (2) citizenship by right of blood (*jure sanguinis*), i. e., by virtue of the father's nationality. Unless this be so, the child on attaining his majority has nothing to elect." (Moore, *Dig. Int. Law*, Vol. III, pp. 524 and 525.)

This Court did no more than hold that the doctrine of *jus sanguinis*, whether viewed as a principle of our municipal law, or as a rule of international law, could not take precedence, within the territorial limits of the United States over the *jus soli* as adopted into our Constitution, when the question involved was the citizenship of a person born within the limits and jurisdiction of the United States.

> "It seems to me," said the Chief Justice in the *Wong Kim Ark* case, "That the rule *partus sequitur patrem* has always applied to children of our citizens born abroad" (169 U. S. at 714).

The rule that a minor child takes the nationality of the father had long since been recognized by this Court in *Boyd* v. *Thayer*, 143 U. S. 138, 178, where the Court said:

> "Clearly, minors acquire an inchoate status by the declaration of intention on the part of their parents. If they attain their majority before the parent completes his naturalization, then they have an election to repudiate the status which they find impressed upon them, and determine that they will accept allegiance to some foreign potentate or power rather than hold fast to the citizenship which the act of the parent has initiated for them."

And this principle was recognized and applied in a case where the facts were very different from the facts in the instant case, where it is admitted that the father was an American citizen at the birth of the child.

One of our most prominent writers on international law has pointed out that

> "By international law, as accepted in the United States and Europe, the children born of American citizens abroad are regarded as citizens of the United States, with the right, on reaching full age, to elect an allegiance and repudiate the other, such election being final" (Wharton, *Conflict of Laws*, Sec. 10, quoted by Van Dyne, *op. cit.*, p. 38).

This view has been repeatedly announced by various Secretaries of State:

On June 7, 1888, Mr. Bayard, Secretary of State, addressed a despatch to M. Vignaud, to which he attached paragraph 131 of personal instructions, in which he quoted section 1993, adding: "That the citizenship of the father descends to the children born to him when abroad is a generally acknowledged principle of international law" (Foreign Relations, Part I, 1888, p. 540).

On April 27, 1886, he wrote Mr. Pendleton: "It is an established principle of international law that a child born abroad to a citizen of the United States partakes of his father's nationality * * *." (Foreign Relations, 1886, p. 327).

"Undoubtedly, by the law of nations, an infant child partakes of his father's nationality and domicile."—Mr. Porter, Acting Secretary of State to Mr. Winchester, Sept. 14, 1885. (*Foreign Relations*, 1885—Wharton, *Int. Law, Dig.*, Vol. II, p. 412).

"In the case of such children (male children who have either been born and lived all their lives abroad or have spent a long period of time in a foreign country), it is our national policy to claim them as American citizens, without regard to the place of their birth, as the offspring of American citizens." ("*Letter from Secretary of State*", p. 17.)

Borchard on more than one occasion refers to "the general rule that an infant child partakes of the nationality of his father" (*Dipl. Prot. Cit. Abroad*, pp. 581, 583). "Practically all the countries of Europe", he says, "and several of the states of Latin America have adopted the system of *jus sanguinis*"; citing Fromageot, *De la double nationalite*, Paris, 1892 (*op. cit.*, p. 578).

The Government's interpretation does violence to the term "all children" in the enacting clause; equal violence to the general doctrine of *jus sanguinis* expressed in Section 1993, taken as a whole, and as construed by the courts, by the various Secretaries of State, and in Departmental practice. In speaking of this act, the Attorney General said:

> "It is to be observed that the statute employs the term 'all children'. Under well established rules of construction, if the statute is to be limited to children other than Chinese, such exception must be made by Congress. It cannot be supplied by interpretation." (30 Op. Atty. Gen. 529, 530.)

As already pointed out, Mr. Binney denies that "the enacting clause was intended to be confined" to the foreign-born children of natural-born American citizens; asserting, on the contrary, that "the enacting clause is not so confined" (*ante*, p. 15).

Had Congress intended that certain foreign-born children of American citizens should be declared to be born

American citizens and others aliens, it would have been easy so to provide. It is fair to suppose that the term "all" would not have been used in the process.

The proviso.

The qualifying clause undertakes in no way to modify the principle that the minor child is born into the national status of the father. It does, however, undertake to restrict or limit the acquisition or enjoyment of *rights of citizenship* by one born into such a status. The status is inchoate until the residence of the father ripens it.

The effect of this proviso is to hold in abeyance the transmission of the *rights of citizenship* from a foreign-born father to his foreign-born son until the former shall have acquired the full rights of American citizenship by coming to reside in the United States. Its purpose, as plainly pointed out by both Binney and Van Dyne (*ante*, pp. 16, 17) is to prevent the propagation of a line of foreign-born "citizens" whose immediate ancestors never resided in this country. It must be read as providing that the foreign-born son of a foreign-born father whose father dies without ever having resided in this country is not a citizen of the United States—having by the fact of such decease lost whatever chance he has hitherto enjoyed of having the inchoate natural status into which he was born ripen (by virtue of the father's residence in this country) to a condition of American citizenship.

This proviso obviously applies only to foreign-born children residing abroad, and establishes the only limitation imposed by the statute of 1855 to operate on the enacting clause. The Act should not be construed as imposing any additional limitation; for exceptions cannot be supplied

by interpretation (*Mackenzie* v. *Hare*, 239 U. S. 299; *United States* v. *Barnow*, 239 U. S. 74; *United States* v. *Portale*, 275 U. S. 27, 30).

Even assuming that the respondent were still residing abroad, it is perfectly plain that his case would not present the situation which it is the avowed purpose of the proviso to avoid or prevent: "the residence abroad of successive generations of persons claiming the privileges of American citizenship while evading its duties."

It is enough to point out that the father of the respondent has been residing in this country for some years; and that the fact of his residence here (leaving wholly to one side the arrival of the son) renders quite impossible the situation which it was the obvious purpose of the proviso to avoid, and which Mr. Binney describes as the indefinite propagation of a race of foreign-born citizens with at length no relation to the United States except that of remote origin (*ante*, p. 16).

It follows from the above considerations, and from those authorities to which abundant reference has already been made that the respondent was born into the status of American citizenship, and became (through his father, as he is a minor) vested with the rights of citizenship, as soon as the power to transmit these rights became active in the father by virtue of his coming to the United States to reside. In other words, ever since the arrival of the father in the United States in 1922, the respondent, as his minor son, has, under Section 1993, partaken of the father's rights of citizenship.

It may be remarked in passing that the distinction made in the statute between the status of citizenship into which the foreign-born minor has been born, and the acquisition

and enjoyment of the rights of such citizenship, has been repeatedly recognized by the Department of State.

> "Children born abroad whose father was, at the time of their birth, a citizen of the United States, are, by virtue of the Act of February 10, 1855, citizens of the United States, and within the sovereignty and jurisdiction of the United States are entitled to all the privileges of citizens. As to whether they are entitled, while continuing to reside abroad, to passports as American citizens, the answer must be more qualified * * *. If * * * they receive passports as citizens of the United States, such passports should be qualified with the statement that, although they are citizens of the United States, their rights as such are subject to the rights, obligations, and duties which may attach to them under the laws of the country in which they were born and in which they continued to live." (Mr. Bayard to Mr. Vignaud, July 2, 1886, *Foreign Relations* 1886, referring to the opinion of Atty. Gen. Hoar of June 12, 1869, 13 Op. Atty. Gen. 89. Moore, *Int. Law Dig.*, Vol. III, p. 529).

And Mr. Fish, in the passages already quoted (*ante*, p. 27) has pointed out the coexistence of citizenship in children born abroad with the absence in them of certain "rights of citizenship," and has in part based his construction of Section 1993 upon this distinction. (Mr. Fish to Mr. Washburne, June 28, 1873; *Foreign Relations* 1873, Part I, 256; Moore, *op. cit.*, Vol. III, p. 283; Mr. Fish, Report to President, August 25, 1873, *Foreign Relations* 1873, Part II, p. 1186, 1191 to 1192.)

> "In refusing protection to a person who is resident abroad without intention of returning to this

> country, *one of his rights of citizenship is withdrawn;* but if his intention changes and he returns to the United States to reside, he may assume at once his *right* to protection." (Letter from Sec. State on "*Citizenship in the United States, Expatriation,* etc.," H. Doc. 326, 59 Cong., 2nd Session, p. 26, Ital. vol.)

That citizenship in an individual may exist and he at the same time be without the power to invoke certain rights of citizenship, appears from the Act of March 2, 1907, and departmental instructions based thereon. Section 6 of that act provides:

> "That *all* children born outside the limits of the United States who are citizens thereof * * * and * * * continued to reside outside the United States shall, *in order to receive the protection of this government*, be required * * *"

to register and take the oath of allegiance as required in the section. On April 19, 1907, the Secretary of State caused to be issued to diplomatic and consular officers an amendment to par. 138 of the consular regulations, together with the text of Section 1993 of the Revised Statutes and the text of Section 6 of the Act of March 2, 1907. It read in part:

> "You are instructed that children born abroad, whose parents were American citizens at the time of their birth, should report to a convenient American consul upon reaching the age of 18 years and before they have reached the age of 19 years, and make a solemn declaration in the following form:"

Lest doubt exist whether, if such a child failed to make such a declaration, his citizenship should be deemed thereby to have been affected, the Department deemed it proper on March 14, 1911, to instruct its diplomatic and consular officers as follows:

> "Referring to the Department circular instruction of April 19, 1907, entitled 'Children of Citizens Born Abroad,' and to section 6 of the act of March 2, 1907, quoted therein, you are informed that the Department has decided that the declarations of 'intention to become residents and remain citizens of the United States' required therein have reference to the right of protection rather than citizenship under municipal law, and that such declarations may be made at any time after the minors concerned have reached the age of 18 years," etc.

With respect to the above, reference may be made to an opinion of the Attorney General in which he concludes that the requirement in question goes only to the point of protection abroad and not to that of citizenship (30 Op. Atty. Gen. 529, 536).

It is thought advisable to make this point the subject of thorough comment, inasmuch as the Government in its argument appears wholly to have overlooked the significance of the use of the word "citizens" in the first clause of Section 1993 when compared with that of the term "rights of citizenship" in the proviso. It is stated on page 10:

> "In the first clause, the rights of citizenship are granted to foreign-born children whose fathers were or may be citizens of the United States at a certain time, namely, at the time of the birth of the children."

This statement is incorrect, inasmuch as the first clause specifically declares "all children", etc., to be "citizens"; whereas, the proviso sets out with equal precision that a child born into this status may never claim that any of "the rights of citizenship" were transmitted to him from a father who never came to live in the United States.

POINT III.

No Such Mischief as is Apprehended by the Government Will Result from an Interpretation of Section 1993 Which Permits the Respondent to Enter the United States as an American Citizen.

It is stated on page 13 of the brief in support of the petition:

> "If the residence prescribed in the proviso may occur after the birth of the children, the door is open to the very evils Congress intended to prevent. The father may come to the United States for the first time after his children have reached maturity, and thus enable the children at some later date to enter this country as citizens thereof. Such children, once their right of admission is perfected by residence of the father, may delay their entry until middle age; yet they would be entitled to admission even though ignorant of American language, customs and institutions. They must be admitted as citizens, although they have evaded the duties and responsibilities of citizenship. They may be persons likely to become public charges or afflicted with disease, yet their right to enter is secure. The process may be repeated generation after generation."

This contention is interesting for the following reasons: The Government states that this is the first time that the Department of Labor has ever had occasion to pass upon such a case as this. While, for reasons already given, this statement is thought erroneous, it may be admitted that the claim of the Government suffices to show, *prima facie* at least, that the Department has never had before it for decision the admissibility as an American citizen of a *grandchild* of a native-born American citizen who, being such grandchild, has himself raised a family abroad. In other words, during the 72 years which have elapsed since the passage of the Act of 1855, and the 45 years since the Chinese Exclusion Act of 1882, and the 30 years since it was first decided by a Federal Court that the son of a native-born American of the Chinese race was an American citizen, (*United States* v. *Wong Kim Ark*, *supra*) that situation, the supposed evils of which are painted in such dark colors, i. e., the application for admission by a *grandchild* of mature age and the head of a family, has never confronted the Department for decision. Nor does it confront the Department now, where the respondent has sought admission as a child of ten.

Where the transmission of certain attributes of the father's status is involved—such as the transmission of the rights of citizenship to the child by virtue of the residence of the father in this country—it stands to reason that such transmission can be operative only while the status of the son is, in law, dependent upon the status of the father, i. e., during the minority of the child or before the latter has acquired as an adult, an independent status. It hardly would be contended that under Section 1993, even prior to the passage of the Act of March 2, 1907, the mere fact of

residence by the father could operate to transmit citizenship to a son who had reached his majority, and who, either by his voluntary act, or by operation of law, had, in his own capacity, vested himself with a foreign citizenship or nationality. The term "children" is used in the law. In this connection the following, quoted from Van Dyne, is not, perhaps, without significance:

> "It will be observed that the statute applies only to 'children'; its language being, "All children * * * are declared to be citizens of the United States' ";

and he quotes from a passage from *Foreign Relations* dealing with the case of Robert Emden, in which the applicant for a passport is informed that "he is met with the difficulty that he is no longer a 'child', but that he is of full age, and that his citizenship is no longer derivative, but is a matter of personal election." (Van Dyne, *op. cit.*, p. 39, quoting Mr. Porter to Mr. Winchester, September 14, 1885, 2 Wharton, *Int. Law Dig.*, p. 411; *Foreign Relations*, 1885, p. 811.)

Aside from the above, Section 6 of the act of March 2, 1907, read in conjunction with Section 1993, would indicate that the fears entertained by the Solicitor General are groundless. That section makes it incumbent upon all children of American citizens resident abroad to register at the age of 18 and to take the oath of allegiance to the United States at 21 if they desire to enjoy the rights of American citizens while abroad, i. e., while abroad enjoy the protection of the United States.

While, as pointed out in Departmental Instructions (*ante*, p. 61), the failure on the part of such children to meet with the requirements set out affects their *rights of citizenship* (i. e., right to protection) rather than the

citizenship status into which they were born, this does not mean that the son of an American citizen may not, by his conduct and attitude with respect to the United States following the failure on his part to take the oath of allegiance prescribed by the Act of March 2, 1907, expatriate himself completely as far as his American citizenship is concerned and thereby make impossible the maintenance of those rights of citizenship which, by virtue of the father's residence in this country during his minority, he may have acquired.

In the case of one whose father, at the time of his birth, has already resided in the United States the "rights of citizenship" pertain. To one whose father has not, at the time of his birth, resided in the United States, and who, therefore, is merely born into the national status of that father, those rights do not *descend* until the father comes to the United States to reside. That is, those rights have not been previously transmitted. The status of the child has been inchoate. The rights are communicated to the minor son by the fact of such residence, coupled with the fact that in law he is susceptible of being covered, so to speak, by his father's status in order to supplant that personal incapacity to acquire an individual status which is an attribute of legal infancy.

To ascribe to the foreign-born son of a foreign-born American citizen who has reached his majority—much less to such a son who, after reaching it has expatriated himself—the acquisition by transmission from a father of the latter's American citizenship by virtue of his residence in this country after the son has reached his majority is, we feel, to read into Section 1993 an interpretation obviously unsound.

The right of such a "grandchild" to enter the United States would depend on whether the national status into which he had been born had, by virtue of residence in the United States by his father, matured during his minority into "rights of citizenship". There could be no such fruition, were the residence of the father postponed until the son had acquired a national status of his own. The situation portrayed by the Government contains no such menace as it apprehends, and no feature in common with this case, where the respondent is still a child of eleven, where the father took up his residence in this country when the child was nine, and where the child's foreign residence has been terminated by the father by bringing the boy to this country, which is, under our law, his native land.

POINT IV.

The Proviso of Section 1993 Applies Exclusively to Children Born Abroad and Residing Abroad and Hence Has no Application to the Minor Children of American Citizens Who Reside in this Country and Who Such Children Seek to Join in the United States After Terminating Their Residence Abroad.

The purpose of the proviso is to prevent a situation arising whereby, in the words of Mr. Binney, "a race of foreign born citizens might be propagated indefinitely under the enacting clause, with at length no relation to the United States but that of remote origin"; or, in the terms used by Mr. Van Dyne, "to prevent the residence abroad of successive generations of persons claiming the privileges of American citizenship while evading its duties."

It follows that the restrictive feature of the proviso applies only to children born and residing abroad—children who have never resided in the United States. Its enactment by Congress constituted a legislative announcement of those restrictions which inhere in the operation of the municipal law of one country with respect to persons situated within the territorial jurisdiction of another country. As stated by Secretary Fish, "it is evident from the proviso * * * that the lawmaking power * * * had in view this limit to the efficiency of its own municipal enactments in foreign jurisdictions." (Quoted in *U. S. v. Wong Kim Ark*, 169 U. S. at 690; see also to same effect, Mr. Fish to Mr. Washburn, *Foreign Relations*, 1873, Vol. 1, 256; Moore, *Int. Law Dig.*, Vol. III, p. 282, 283).

The "limit" above referred to was that Congress did not contemplate the conferring of the full right of citizenship upon the subject of a foreign nation who had not come within our territory, so as to interfere with the just rights of such nation; and that if children of American citizens born in a foreign country are subjects of its government the legislation of the United States should not interfere with the allegiance they might owe to the country of birth while they continued within its territory.

The respondent is not residing abroad. He is not in the position of one who is attempting to base his claim of American citizenship on the passage of rights of citizenship by descent or inheritance from a father who has never resided in the United States. Being born abroad to an American citizen, he is necessarily included within the classification of "all children * * * born out of the limits and jurisdiction of the United States, whose fathers were

* * * at the time of their birth citizens thereof * * *"; hence was born into the national status of his father.

His father has for some years been residing in this country as an American citizen by birth. He has now brought the respondent to join him in such residence. There is no question (if one ever existed) of an interference with the allegiance of the respondent to the country of his birth by virtue of any claims over him that the United States might have under Section 1993. He has now placed himself within the limits and jurisdiction of the United States, and by so doing has eliminated from the situation any question of dual allegiance or dual nationality. That this result is reached by the fact of departure from the country in which the individual was born is recognized by this Government both with respect to children born abroad to American citizens, and children born in the United States to foreign parents.

> "If, by the laws of the country of their birth, children of American citizens born in such a country are subjects of its Government, the legislation of the United States will not be construed so as to interfere with the allegiance which they owe to the country of their birth *while they continue within its territory.*" (*Consular Regulations of the United States* 1881, Sec. 173; Moore, *Int. Law. Dig.*, Vol. III, p. 321.)
>
> "While a person born in the United States, though of alien parents, is by the laws thereof a citizen, yet, should he be taken by his parents while a minor to the country of which they are subjects, *he becomes amenable to the laws of that country and subject to a claim of allegiance there under* jure sanguinis. On this ground the Department of State refused to issue a passport for the protection of a

minor, born in the United States, whose parents proposed to return with him, 'for a brief period' to the country (Russia) of which they were subject." Mr. Gresham, Secretary of State, to Mr. Seely, March 9, 1893, 190 *MS. Dom. Let.* 553; Moore *Int. Law Dig.*, Vol. III, p. 533; ital. vol.)

The presence here of the respondent operates to remove him *ipso facto* from the effects of a proviso which applies solely to children born to American citizens abroad who never have resided in this country and who continue to reside abroad. In this connection the following quotation is in point:

> "Taking a concrete case of a child born in China to a father also born there, the father of the latter being a native-born American citizen, it immediately becomes apparent that the father was born into a complete state of citizenship, so far as the United States is concerned, for his case is undoubtedly embraced in the inclusive term 'All children' which opens Sec. 1993, and the description 'born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof' exactly fits his case. Then, it is quite as apparent that the child's father, at the time of the child's birth, was a citizen of the United States in the most complete sense, so far as the United States was concerned, for the statute does not say that such a person shall be regarded as a 'potential citizen,' but it says that persons born under such circumstances 'are declared to be citizens of the United States.' This being the situation of the father, he is entitled at any time during his life freely to enter the United States. He does not have to come before arriving at his majority, or before having married, or before having a child born to

him; but his citizenship is complete, and the quality (from the international point of view) of the status into which he was born abroad, altogether disappears upon his placing himself within the physical jurisdiction of the United States." (*Ineligible to Citizenship Provisions of Immigration Act of 1924*—A. Warner Parker—American Journal of International Law, January, 1925, pp. 42-43.)

POINT V.

The Respondent is Not an Alien Within the Meaning of the Immigration Act of 1924.

On August 7, 1924, there was issued by the Department of Labor a letter (No. 55266, General) "designed to fully explain Chinese General Order No. 4 issued this date and inclosed herewith."

On page 7 it is set out that

> "Under the new law no Chinese alien wife or alien child of the Chinese race of an American citizen is admissible solely because of such relationship to such person. This includes all Chinese children born aliens and later adopted by citizens of the United States * * *. In an opinion dated August 1, 1924, the Solicitor for the Department held that under Section 1993 Revised Statutes, the rights of citizenship do not descend to a child whose father never resided in the United States prior to the birth of such child, and that citizenship does not vest in such child by residence of the father at any time subsequent to its birth. This opinion has been approved by the Department, and all immigration officers must

> be guided thereby in determining whether the foreign-born child of an American citizen is a citizen or an alien."

No such interpretation of Section 1993, even in the form of an opinion of a Department Solicitor had been in existence prior to the passage of the Immigration Act of 1924—hence no knowledge of such an opinion, for what it was worth, was to be attributed to Congress when it passed the act in question.

At the time the Act was passed, Congress knew or must be presumed to have known that this Court had held in the *Wong Kim Ark* case (169 U. S. 649) that a person of the Chinese race, born in the United States, was and is under the Constitution a native-born citizen of the United States; knew or must be presumed to have known of the numerous decisions of the Federal Courts holding that the foreign-born children of such a citizen were themselves citizens by birth; knew or must be presumed to have known of the numerous decisions rendered by the Federal Courts holding that the sons of such native-born citizens, when presenting themselves for admission to this country were under the laws of the United States citizens of the United States—and this irrespective of whether they were majors or minors making their first application for admission; knew or must be presumed to have known that the Attorney General of the United States, in an elaborate opinion rendered in April, 1916, eight years before the Immigration Act of 1924 was passed, had likewise held that "foreign-born children of American-born Chinese fathers are entitled to enter the United States as citizens thereof, notwithstanding that they continued to reside for some time in

China after reaching their majorities without affirmative action on their part indicating an intention to remain citizens of the United States." (30 Op. Atty. Gen. 529.)

Not only this; for in 1869, some fifty-five years before the Immigration Act of 1924 was passed, the status in the United States of the foreign-born child of a native-born citizen had been carefully defined by eminent authority (13 Op. Atty. Gen. 90, 91).

Congress must, therefore, have known or must be presumed to have known that the status of such a person had been officially announced by the Attorney General of the United States in an opinion given to Mr. Fish in 1869—that this opinion had been accepted and followed for over fifty years in the Department of State; and that it had received the sanction of this Court in the *Wong Kim Ark* case over a quarter of a century before the passage of the Immigration Act. Said this Court:

> "In 1869, Attorney General Hoar gave to Mr. Fish, the Secretary of State, an opinion that children born and domiciled abroad whose fathers were native-born citizens of the United States and had at some time resided therein, were, under the statute of February 10, 1855, c. 71, citizens of the United States and entitled to all the privileges of citizenship which it is in the power of the United States Government to confer. Within the sovereignty and jurisdiction of this nation, they are undoubtedly entitled to all the privileges of citizens." (*U. S. v. Wong Kim Ark*, 169 U. S. 689; see *ante*, p. 45.)

Over a quarter of a century before this act was passed, the father of the applicant had, because his father was a native-born citizen of the United States, himself been born

such citizen. This no one denies. Two years before the act was passed, he had come to the United States to live, and at the time of its passage was living here, a recognized American citizen by birth. These facts are admitted by the government without reservation. Being such a citizen, and having subjected himself to "the sovereignty and jurisdiction of this nation" at the time the act went into effect, it necessarily follows that the father of the respondent was, at that time, in the words of Mr. Hoar, "entitled to all the privileges of citizenship which it is in the power of the United States government to confer".

When the Act of 1924 was passed, Congress knew, or must be presumed to have known, that one of those "privileges of citizenship" was the right of the citizen to transmit citizenship to his children; for this right had, in official utterances in the course of conducting the foreign relations of the United States upwards of fifty years before, been asserted by a great Secretary of State as inherent in full American citizenship; and over a quarter of a century thereafter this Court, in the *Wong Kim Ark* case, had with approval quoted the language of Mr. Fish, and lent these statements added weight by incorporating them in a decision which involved the determination of an issue of the first magnitude.

It follows that it is not logically conceivable that with these precedents presumably stirring in the legislative consciousness, Congress could have intended to include within the meaning of the term "alien" the son of a person born an American citizen, admitted to this country as an American citizen, living here as such citizen, and as such resident American citizen "entitled to all the privileges of citizenship which it is within the power of the United States gov-

ernment to confer''; not the least of which is the power to transmit his citizenship to his minor children.

A reading of the law fails to show that the legislator intended to create a new type of being described as ''an alien child, of the Chinese race, of an American citizen''. Neither was there any need for him to provide, nor did he attempt to provide, that an ''*alien* child of the Chinese race'' was ineligible to citizenship, for that had been conceded for generations. The law simply provides that ''aliens ineligible to citizenship'' are under certain conditions inadmissible. It does not purport to create a new type of ''alien ineligible to citizenship'', but merely imposes restrictions as to admission upon aliens who under pre-existing laws are ineligible in this respect.

The Government insists that Congress, when in paragraph (c) of Section 13 of the Immigration Act of 1924, it used the words ''no alien ineligible to citizenship shall be admitted'', had in mind the son born to an American father who at the time of the birth was a citizen of the United States.

But Congress took care to explain under Section 28, ''*General Definitions*'', what it meant by the term ''ineligible to citizenship'':

> ''(c) The term 'ineligible to citizenship', when used in reference to any individual, includes an individual who is debarred from becoming a citizen of the United States under section 2169 of the Revised Statutes, or under section 14 of the Act entitled 'An Act to execute certain treaty stipulations relating to Chinese', approved May 6, 1882, or under section 1996, 1997, or 1998 of the Revised Statutes, as amended, or under section 2 of the Act entitled 'An Act to authorize the President to increase tem-

> porarily the Military Establishment of the United States,' approved May 18, 1917, as amended, or under law amendatory of, supplementary to, or in substitution for, any of such sections".

Is it necessary to point out that Section 2169, providing for naturalization by court proceedings, did not contemplate the granting to or withholding from the benefits of its provisions the minor son of a resident American citizen? Or that Section 14 of the Chinese Exclusion Act of May 6, 1882, which prohibited any state or federal court from admitting Chinese to citizenship was not passed in contemplation of the possibility that the son born into the status of American citizenship would present himself to such court with the purpose of being so admitted? It would be as unnatural to answer these questions otherwise as it would be to assert that the petitioner is a deserter coming within the prohibitive clauses of Sections 1996, 1997 or 1998 of the Revised Statutes, or Section 2 of the Act approved May 18, 1917.

The same as to the term "alien". Par. (b) of Section 28 provides that "the term 'alien' includes any individual not a native-born or naturalized citizen of the United States * * *."

But the respondent was born into a naturalized status, and, as a minor child of an American citizen, has remained so, by virtue of Section 1993.

Says the Court in the case of *Wong Kim Ark*:

> "A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress, exercised *either by declaring certain*

> *classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens*, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts." (Pp. 702, 703; ital. vol.)

It has already been shown that under Section 1993 Congress declared "all children" of American fathers born abroad to be citizens of the United States; and that the proviso was restrictive only of the *right* (rights) of citizenship—in the words of this Court, "restricted the right of citizenship thereby conferred upon foreign-born children of American citizens to those children themselves, unless they became citizens of the United States".

Congress, when enacting the Immigration Act of 1924, must be deemed to have been fully acquainted with Section 1993 of the Revised Statutes—with the interpretation placed thereon by the Department of State and above all with the interpretation placed upon it by this Court—and surely cannot be supposed to have referred, when using the term "alien", to the son born to an American citizen, coming literally within terms of a statute declaring "all children" born abroad to American fathers, citizens of the United States—the only condition essential to whose enjoyment of the rights of citizenship abroad was that their fathers should come to reside in the United States.

CONCLUSION.

(1) The respondent, as all admit, was born abroad to his father, Chin Dun, an American citizen by birth. At the time of respondent's birth he was by virtue of the enabling

clause of Section 1993 of the Revised Statutes born into the natural status of his father. At the time of the birth his father had not yet resided in the United States; hence at that time could not transmit any of the rights of citizenship to the respondent. In 1922 the father came to the United States to reside. By taking up his residence here he became vested with all the powers and privileges of American citizenship, among them that of transmitting the rights of citizenship to his children. On June 18, 1922, the respondent, in addition to being born into the national status of his father, became by operation of law the recipient of rights of citizenship transmitted by the father by virtue of his residence here. Even if the respondent were still residing abroad he would, by virtue of his father's citizenship and residence here, be vested with all the rights of his father's status except that of transmitting citizenship to such children as he, the respondent, might have in the future.

(2) The respondent was born into the national status of the father. While still maintaining that status he has come to join his father in this country. Not residing abroad, having terminated his foreign residence, and, the son of an American citizen having come to reside here with his father, he has entered the territorial limits and submitted himself to the jurisdiction of the United States; hence does not come within the operation of the restrictive proviso of Section 1993, and is entitled to all the privileges of American citizenship.

(3) At the time the Immigration Act of 1924 was passed the father of the respondent, an American citizen by birth, was present and residing in the United States. At that time and for years prior thereto the minor children of

American citizens of Chinese descent residing in the United States were recognized as partaking of the citizenship of their fathers and admitted as partakers thereof; at that time the Courts, the Department of State, the Department of Labor, and the Attorney General of the United States, were unanimous on the point that the minor children of such resident American citizens were themselves citizens of the United States. In order to attribute to Congress the intention to exclude the respondent as an alien under the Act of 1924 such intention, in view of what has already been stated, must be indicated in unmistakable terms. No language justifying the existence of such intention is to be found in the act. Hence no such intention may be ascribed to Congress. It follows that the petitioner, a minor child of a resident American citizen, born into the status of his American father, cannot be considered excludable as "an alien ineligible to citizenship" described in the Immigration Act of 1924.

(4) Had it been the intention of Congress to legislate to the effect that the child born to an American citizen by birth, residing in this country, was an alien ineligible to citizenship, Congress would have lacked the power to do so. The power of naturalization vested in Congress by the Constitution is a power to confer citizenship, not to take it away (*United States* v. *Wong Kim Ark*, 169 U. S. 703). The respondent had already become naturalized by the act of 1855, coupled with the fact that his father had come to reside in this country. Congress has no power to abridge the rights conferred by the Constitution upon those who become naturalized citizens by virtue of acts of Congress (*ibid.*, p. 703).

(5) Had it been the purpose of the enacting clause of Section 1993, which declares that *all* children born to fathers who, at the time of their birth were citizens of the United States, were themselves American citizens, to provide that of the children so born certain ones only were born citizens and others aliens, the terms of the statute should have made this clear—just as, had it been the purpose of the *proviso* that the rights of citizenship should descend only to those children whose fathers, prior to their birth had lived in this country, the *proviso* should have read:

> "But the rights of citizenship shall not descend to children whose fathers had not resided in the United States prior to the birth of such children" (*Johnson, C'r* v. *Sullivan ex rel. Dea Gim Moy*, 8 F. (2d) 988).

In view of the foregoing it is respectfully submitted that the decision of the Circuit Court of Appeals be affirmed.

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